IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. HARSIMMER SINGH SHERGILL, Appellant.	)	2 CA-CR 2006-0188 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200401829

Honorable Boyd T. Johnson, Judge

AFFIRMED

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V Á S Q U E Z, Judge.

¶1 A jury found Harsimmer Singh Shergill guilty of one count of taking the identity of another person, three counts of forgery, and one count of misconduct involving a weapon. The trial court sentenced Shergill to concurrent 2.5-year prison terms for the identity theft and forgery convictions, to be followed by a 2.5-year term of imprisonment for the weapons misconduct conviction. On appeal, Shergill argues the trial court erred in admitting evidence and in denying his motion for judgment of acquittal made pursuant to Rule 20, Ariz. R. Crim. P., 17 A.R.S. We affirm.

Background

¶2 We view the evidence and all reasonable inferences therefrom in the light most favorable to upholding Shergill's convictions. *See State v. Carlos*, 199 Ariz. 273, ¶ 2, 17 P.3d 118, 120 (App. 2001). In 2004, an investigator with the Pinal County Attorney's office received information that a man living in Superior was using the name of a deceased person, Stephen Somerall. Based on this information, the investigator obtained a search warrant for Shergill's residence. During the search, investigators found a hunting license and big game permits issued by the Arizona Game and Fish Department and a Washington, D.C. driver's license, all in the name Stephen Somerall. The investigators also discovered a fully automatic submachine gun.

¶3 At trial, the state presented evidence that a man named Stephen Robert Somerall, born on August 23, 1951, had died in Washington, D.C. on August 14, 1987. The Washington, D.C. driver's license found during the search of the residence in Superior was issued in the name of Stephen R. Somerall, with a birth date of August 23, 1951. The

license had been issued on August 7, 2002, almost fifteen years after the decedent's death. The hunting license and big game permits were also issued after the decedent's death.

Discussion

A. Rule 20 motion

¶4 Shergill argues the trial court erred in denying his motion for judgment of acquittal, made pursuant to Rule 20, Ariz. R. Crim. P., on all five charges. "We review a trial court's denial of a Rule 20 motion for an abuse of discretion and will reverse a conviction only if there is a complete absence of substantial evidence to support the charges." *Carlos*, 199 Ariz. 273, ¶ 7, 17 P.3d at 121. Substantial evidence is that which reasonable persons would accept as proof sufficient to support a conclusion of guilt beyond a reasonable doubt. *State v. Molina*, 211 Ariz. 130, ¶ 8, 118 P.3d 1094, 1097 (App. 2005). If reasonable persons could differ on the inferences to be drawn from the evidence, the case must be submitted to the jury. *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993). We examine each charge in turn.

1. Identity theft charge

¶5 For using Somerall's personal information, Shergill was charged with violating Arizona's identity theft statute, A.R.S. § 13-2008(A), which provides:

> A person commits taking the identity of another person . . . if the person knowingly takes, purchases, manufactures, records, possesses or uses any personal identifying information . . . of another person . . . , including a real or fictitious person . . . , without the consent of that other person . . . , with the intent to obtain or use the other person's . . . identity for any unlawful purpose or to cause loss to a person . . . whether or not the

> person . . . actually suffers any economic loss as a result of the offense.

In support of his Rule 20 motion on this charge, Shergill argued that the state had not established that he had taken Somerall's identity with the intent to use it for any unlawful purpose, as § 13-2008(A) requires.

¶6 The state argued in response that the evidence showed Shergill had obtained a hunting license and big game permits in Somerall's name, in violation of Game and Fish Department regulations, thereby showing his intent to use Somerall's identity for an unlawful purpose. In denying Shergill's Rule 20 motion on this charge, the trial court stated: "I believe there's been sufficient evidence to allow [the state] to argue to the jury . . . that when [Shergill] took [Somerall's] name he had in mind an unlawful purpose and that is to mislead through misrepresentation government agencies or other individuals." We find no abuse of discretion in the trial court's ruling. *See Carlos*, 199 Ariz. 273, ¶ 7, 17 P.3d at 121.

¶7 There is substantial evidence here to support the identity theft conviction. The state presented evidence that the hunting license and big game permits had been issued to a person using the name and birth date of a deceased man. The state also presented the testimony of an investigator from the Game and Fish Department that "it is unlawful [under A.R.S. § 17-341] to apply for a license by fraud or misrepresentation." From this, reasonable jurors could infer that Shergill took the identity of another with the intent to use it for the unlawful purpose of obtaining a license by misrepresentation. The trial court properly denied Shergill's Rule 20 motion on this charge.

2. Forgery charges

¶8 For possessing the driver's license, hunting license, and big game permits in Somerall's name, Shergill was charged with three violations of A.R.S. § 13-2002(A)(2), which provides: "A person commits forgery if, with intent to defraud, the person . . . [k]nowingly possesses a forged instrument." Shergill argued that the state had not presented any evidence of fraudulent intent because there was no evidence that, by using Somerall's name instead of his own, Shergill had received anything he was not otherwise entitled to receive. The state responded that it did not have to prove that Shergill had obtained something he was not entitled to, but only that he had "received something through fraud." The trial court denied Shergill's motion after finding sufficient evidence had been presented from which the jury could conclude that Shergill had committed forgery.

¶9 Shergill renews his argument on appeal that the state presented insufficient evidence of the required intent to defraud. He contends the evidence showed nothing more than that he had "applied in one name for privileges that would have been awarded to him under any name."[1] The state asserts that there was sufficient circumstantial evidence from which the jury could infer that Shergill had the requisite intent to defraud. The state further asserts that Shergill's actions of obtaining government-issued privileges in another's name

[1]Shergill also asserts that his "mere use of another's name is not fraud." We recognize that, under the common law, a person has "the right to assume a name not given him by his parents." *State v. Carroll*, 21 Ariz. App. 99, 100, 515 P.2d 1197, 1198 (1973). However, the evidence here showed that Shergill used not only Somerall's name but also his birth date.

are sufficient to show his intent to defraud, citing *State v. Thompson*, 194 Ariz. 295, ¶ 16, 981 P.2d 595, 598 (App. 1999).

¶10 In *Thompson*, the defendant argued there was no proof that she had intended to defraud anyone when she altered several vehicle registrations, because there was no evidence that any of the vehicles were stolen. *Id*. ¶ 12. Division One of this court affirmed the defendant's forgery convictions, concluding that in altering the registrations the defendant had "undermined the authenticity and accuracy of those records and impaired a government function." *Id*. ¶¶ 1, 16. Similarly, by knowingly obtaining a driver's license, hunting license, and big game permits using the name and birth date of another, Shergill intentionally undermined the authenticity and accuracy of the driver's license records in Washington, D.C. and the records of the Arizona Game and Fish Department, impairing the functions of those government agencies in keeping accurate records.

¶11 Furthermore, a person can commit fraud "even if no one loses money or something of value." *Id*. ¶ 15. And it makes no difference that Shergill could also have obtained these benefits by using his own name. *See id*.[2] Shergill's "possession of the forged [licenses and permits] defies plausible explanation other than possession with intent to defraud." *State v. Dixon*, 7 Ariz. App. 457, 458, 440 P.2d 918, 919 (1968). There was

[2]At oral argument in this court, Shergill argued that *State v. Thompson*, 194 Ariz. 295, 981 P.2d 595 (App. 1999), was wrongly decided and asked us to disagree with it. Although we are not bound by *Thompson*, we find it persuasive and follow it because we are not convinced that it is clearly erroneous or that conditions have changed such that it is rendered inapplicable. *See State v. Benenati*, 203 Ariz. 235, ¶ 7, 52 P.3d 804, 806 (App. 2002); *Danielson v. Evans*, 201 Ariz. 401, ¶ 28, 36 P.3d 749, 757 (App. 2001).

sufficient evidence from which the jury could reasonably conclude that Shergill had the requisite intent to defraud necessary to support the forgery convictions. Accordingly, the trial court properly denied Shergill's Rule 20 motion on the forgery charges.

3. Weapons misconduct charge

¶12 Shergill was charged with possessing a prohibited weapon, the fully automatic submachine gun, in violation of A.R.S. § 13-3102(A)(3). *See* A.R.S. § 13-3101(7)(c) (prohibited weapon includes weapon capable of firing more than one shot automatically by a single pull of the trigger). In his Rule 20 motion, Shergill argued the state had not presented any evidence that he did not have a permit for the weapon. Apparently relying on § 13-3102(C)(4), he asserted that such evidence is "an element of the offense" the state was required to prove. That subsection of the statute provides: "Subsection A, paragraph[] . . . 3 . . . of this section shall not apply to: . . . [a] person specifically licensed, authorized or permitted pursuant to a statute of this state or of the United States."

¶13 The trial court, however, understood Shergill to be referring to § 13-3101(B), which excepts from the definition of prohibited weapons those that are registered in the national firearms registry. Without comment from the state, the trial court found that this exception is an "affirmative defense, not an element of the offense" and denied the Rule 20 motion. Shergill argues on appeal, however, that his Rule 20 motion was based on § 13-3102(C)(4). Regardless of whether Shergill's motion was based on the exceptions in § 13-3102(C)(4) or § 13-3101(B), however, the trial court correctly determined that exceptions to the weapons misconduct statute do not constitute elements of the offense.

¶14 The classification of persons to whom a statute, by its terms, does not apply is not an element of the statute itself. *State v. Quandt*, 17 Ariz. App. 33, 34, 495 P.2d 158, 159 (1972); *see also State v. Kelly*, 210 Ariz. 460, ¶ 11, 112 P.3d 682, 685 (App. 2005) (exceptions to criminal statutes do not constitute elements of offense). And, the defendant, not the state, bears the burden of showing that he or she falls within an exception to a statute. *Kelly*, 210 Ariz. 460, ¶ 11, 112 P.3d at 685.

¶15 In *State v. Berryman*, 178 Ariz. 617, 875 P.2d 850 (App. 1994), Division One of this court addressed the issue of whether the exception now contained in § 13-3101(B) constitutes an element of the offense that the state must prove beyond a reasonable doubt. There, the court held: "By excepting certain registered firearms from the definition of prohibited weapons, the legislature did not intend to create non-registration as an element of the offense." *Id.* at 621, 875 P.2d at 854. "'The well-established rule is that a defendant who relies upon an exception to a statute made by a proviso or a distinct clause, whether in the same section of the statute or elsewhere, has the burden of . . . showing that he comes within the exception.'" *Id.* at 621-22, 875 P.2d at 854-55, *quoting United States v. Henry*, 615 F.2d 1223, 1234-35 (9th Cir. 1980); *see also Kelly*, 210 Ariz. 460, ¶ 15, 112 P.3d at 686.

¶16 Shergill nonetheless asserts that § 13-3102 does not "describe any of its many exclusions as defenses" and that "this particular subsection [§ 13-3102(C)(4)] is not one in

which the exception should be an affirmative defense." We disagree.[3] The subsection at issue here, which excludes persons who have a permit from the weapons misconduct statute, constitutes an exception to the statute and not an element of the crime regardless of whether the statute itself labels it as an affirmative defense. In order to avail himself of the protection of the statutory exception, Shergill was required to show that he came within the class of persons it described. *See Kelly*, 210 Ariz. 460, ¶ 15, 112 P.2d at 686; *see also Berryman*, 178 Ariz. at 622, 875 P.2d at 855. Shergill failed to meet this burden because he presented no evidence that he had a permit for the submachine gun. He does not otherwise argue that the state had failed to prove the elements of the charge of possessing a prohibited weapon. Thus, the trial court did not abuse its discretion in denying Shergill's Rule 20 motion on the weapons misconduct charge.

B. Admission of evidence

¶17 Shergill argues that the trial court abused its discretion in admitting a fingerprint card to establish his true identity. At trial, the state offered into evidence an exhibit consisting of an unsigned letter from the Federal Bureau of Investigation (FBI) attached to a card bearing Shergill's name and fingerprints that was purportedly created by the Immigration and Naturalization Service (INS) in 1976, when Shergill came to the United States. The card had been sent to the FBI and then returned by the FBI to an agent with Immigration Customs and Enforcement (ICE), formerly known as INS.

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[3]Statutory exceptions are not necessarily "true affirmative defense[s]" but they "function[] similarly to an affirmative defense." *See State v. Kelly*, 210 Ariz. 460, ¶ 15, 112 P.3d 682, 686 (App. 2005).

¶18 The state offered the INS fingerprint card as proof that "the person arrested who said he was Stephen Somerall is the same person sitting in court today . . . [and] is, in fact, Mr. Shergill . . . and not Mr. Somerall." Shergill objected on the grounds that the document was not properly authenticated and was inadmissible hearsay. Without specifying the basis for its ruling, the trial court admitted the fingerprint card.

¶19 We will not disturb a trial court's ruling on the admissibility of evidence absent an abuse of discretion. *State v. Stotts*, 144 Ariz. 72, 82, 695 P.2d 1110, 1120 (1985). Objections based on authentication and hearsay are separate: "an authenticity objection questions the form in which the evidence is presented" while "[a] hearsay objection concerns the reliability of evidence itself." *Id*. at 81-82, 695 P.2d at 1119-20. "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Ariz. R. Evid. 901(a), 17A A.R.S.; *see also State v. Lavers*, 168 Ariz. 376, 386, 814 P.2d 333, 343 (1991). The trial court does not determine whether the evidence is authentic, "but only whether evidence exists from which the jury could reasonably conclude that it is authentic." *State v. Wooten*, 193 Ariz. 357, ¶ 57, 972 P.2d 993, 1004 (App. 1998).

¶20 Shergill argues that the fingerprint card was not a self-authenticating document under Rule 902, Ariz. R. Evid., 17A A.R.S., as the state had originally contended at trial. Because the card does not contain the certification required by that rule, we agree that it was not a self-authenticating document. However, we can uphold a trial court's ruling if it is

correct for any reason. *See State v. King*, 213 Ariz. 632, ¶ 8, 146 P.3d 1274, 1277 (App. 2006); *see also State v. Thompson*, 166 Ariz. 526, 527, 803 P.2d 937, 938 (App. 1990) ("The trial court's ruling, even though based incorrectly on another rule, will be affirmed if the trial court has reached a correct result.").

¶21 Rule 901(b)(7), Ariz. R. Evid., is an illustration of authentication that conforms with the requirement of authentication as a condition precedent to admissibility:

> *Public records or reports*. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

¶22 Here, Officer Patrick Contreras with ICE testified that ICE maintains an "alien file" on every person it has dealt with who has "received a benefit" or has had "an enforcement action" taken against them. He testified that the alien file for Shergill, with a birth date of October 15, 1950, showed that he had entered the country legally in January 1976 through New York. Contreras then testified that whenever ICE obtains fingerprints from somebody, which it does when it apprehends someone or when someone applies for "benefits," it forwards the fingerprints to the FBI.

¶23 An investigator with the Pinal County Attorney's office, Rex Gygax, testified that he had obtained a card from the evidence vault in his office containing fingerprints that "appear to have been rolled" in April 1976. Gygax further testified that, based on the markings on the card, it appeared to be "a card that was submitted to the FBI from the New York INS" because "in the old days when someone was fingerprinted, generally speaking,

an agency would keep one copy, . . . and another set of rolled prints . . . would be submitted to the FBI for their records because the FBI keeps the massive national fingerprint database." Gygax then testified that, by comparing the 1976 fingerprints to fingerprints he had taken from the person on trial, he had determined that both sets of fingerprints were from the same person. The 1976 fingerprint card admitted into evidence shows Shergill's name and birth date of October 15, 1950.

¶24 The trial court could have determined that this was some evidence from which the jury could reasonably conclude that the card was what the state said it was, that is, a card bearing Shergill's fingerprints, created by the INS in 1976, sent to and later returned from the FBI. *See, e.g., King*, 213 Ariz. 632, ¶ 11, 146 P.3d at 1278 (finding trial court appropriately determined there was some evidence from which jury could reasonably conclude that records were of defendant's prior conviction); *Thompson*, 166 Ariz. at 527, 803 P.2d at 938 (same). Thus, the trial court did not abuse its discretion in admitting the INS fingerprint card on authenticity grounds.

¶25 This does not end our inquiry, however, because Shergill's hearsay objection raised a separate challenge to the reliability of the evidence. *See Stotts*, 144 Ariz. at 81, 695 P.2d at 1119. He contends that the record was improperly admitted, apparently under the public records and reports exception to the rule precluding admission of hearsay evidence in Rule 803(8)(A), Ariz. R. Evid., 17A A.R.S. That rule provides, in pertinent part: "Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations, in any form, of public offices or agencies, setting

forth . . . the activities of the office or agency" are not excluded by the hearsay rule. Shergill argues that this exception does not apply because no witness testified that it is the routine activity of the FBI to keep fingerprint records.

¶26 The state argues on appeal that the card was properly admitted under Rule 803(8) because Contreras testified that "ICE routinely sends copies of fingerprint cards to the FBI" and Gygax testified that "agencies routinely submitted copies of fingerprint cards to the FBI because it 'keeps the massive national fingerprint database.'" Shergill, however, asserts that "testimony from a non-FBI witness as to what records are kept by the FBI is not generally sufficient to allow in a public record." To some extent, both Shergill and the state miss the point that the record is not, in fact, an FBI record. Rather, it was an INS record that happened to have been sent to the FBI to be retained in its database.

¶27 Shergill acknowledges that "the State was seeking to use [the fingerprint card] as an INS record, not as an FBI record." And the trial court did not specify Rule 803(8)(A) as the basis for admitting the fingerprint card. Under Rule 803(8)(B), "matters observed pursuant to a duty imposed by law as to which matters there was a duty to report" are not excluded by the hearsay rule. *See also Bohsancurt v. Eisenberg*, 212 Ariz. 182, ¶¶ 36-39, 129 P.3d 471, 481 (App. 2006). As we have noted above, Contreras testified that the INS took fingerprints from people who had applied for benefits, who had been apprehended, or who had had some "enforcement action" taken against them. Both he and Gygax testified that fingerprint cards were routinely sent to the FBI to be retained in its database. And, the fingerprint card bearing Shergill's prints and information appeared to have originated with

the INS. From this evidence, taken together, the trial court reasonably could conclude that the fingerprint card had been kept in the normal activities of the INS and constitutes a public record under Rule 803(8). *See State v. Gillies*, 142 Ariz. 564, 572, 691 P.2d 655, 663 (1984) (finding that fingerprint card is public record admissible under Rule 803(8)). Thus, the trial court did not abuse its discretion in admitting the fingerprint card over Shergill's hearsay objection.

¶28 Shergill's convictions and sentences are affirmed.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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JOSEPH W. HOWARD, Presiding Judge